

Delhi High Court

Badri Singh Vinimay Private ... vs Mmtc Limited on 6 January, 2020

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 29th November,, 2019

Pronounced on: 6th January, 2020

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O.M.P. 225/2015

BADRI SINGH VINIMAY PRIVATE LIMITED Petitioner

Through: Mr.Jayant Mehta, Ms.Pratiksha
Sharma, Mr. Ankit Acharya &
Mr.Sajal Jain, Advocates.

versus

MMTC LIMITED

..... Respondent

Through: Mr.Sanat Kumar, Senior Advocate
with Mr.Saubroto Dutta, Mr.Vinayak
Batta & Mr.Sarthak Khurana,
Advocates.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"], the petitioner seeks setting aside of an award dated 02.12.2014 passed by a sole arbitrator. By the impugned award, the respondent herein was awarded a sum of 1,12,27,431/- alongwith interest and costs of the arbitration proceedings.

Facts

2. The disputes between the parties arise out of a tender floated by the respondent for sale of 1500 metric tonnes ("MT") of imported lentils (toor lemon - Myanmar origin). The petitioner's bid for purchase of 250 MT of the goods @ 42,810/- per MT was accepted. The respondent contended that the petitioner had failed to lift the goods, as a result of which it was compelled to sell the material to third parties at the risk and cost of the petitioner.

3. In terms of the agreement between the parties, the respondent sought to invoke arbitration in accordance with the Rules of the Indian Council of Arbitration (hereinafter "ICA"). The respondent's claims in the arbitration proceedings were for the loss allegedly incurred in the risk sale.

4. The petitioner approached the City Civil Court, Calcutta by filing Title Suit No.1297/2013, in which it appears that the validity of the agreement itself was challenged. The respondent filed an application in the suit under Sections 8 and 21 of the Act (for reference of the matter to arbitration). Although the pleadings and records of the suit and the orders passed by the City Civil Court are only partially produced on the record of this petition, it is undisputed that the City Civil Court did not grant any stay of the arbitration. In the circumstances, the learned Arbitrator rejected the repeated requests of the petitioner for adjournment. There was some correspondence between the petitioner and ICA relating to the pending arbitration, but the petitioner did not participate in the proceedings.

The learned Arbitrator therefore made the impugned award, after recording the evidence led on behalf of the respondent.

Submissions

5. The principal legal ground urged by Mr. Jayant Mehta, learned counsel for the petitioner, was that the proceedings of the arbitration themselves were vitiated by an improper invocation of the arbitration. He contended that no notice invoking arbitration proceedings was served upon the petitioner in terms of Section 21 of the Act and Rule 15 of the Rules of Arbitration of the ICA. Mr. Mehta referred to the judgment of this Court in *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.* 2017 SCC Online Del 7228 [O.M.P 3/2015, decided on 28.02.2017]. He also drew my attention to the grounds taken in the petition with regard to limitation, the absence of an arbitration agreement itself, and the merits.

6. Mr. Sanat Kumar, learned Senior Counsel for the respondent, submitted that the contention of the petitioner regarding non-compliance with Section 21 of the Act is belied by the petitioner's own correspondence showing that he had notice of the arbitral proceedings, and had chosen not to participate. He relied upon various judgments (to which reference shall be made later in this judgment) to contend that any dispute regarding compliance of Section 21 was within the province of the arbitrator, and ought to have been raised at that stage. On merits, Mr. Kumar contended that the impugned award was passed on a proper appreciation of the evidence led before the learned Arbitrator and, in any event, that the re-appreciation of evidence is beyond the scope of the power conferred by Section 34 of the Act.

7. During the course of hearing, Mr. Kumar submitted that the respondent had recalculated the amount due under the head "Interest on risk sale for the period from 21.06.2010 to 04.10.2011". Pursuant to the directions of the Court, the respondent has filed an affidavit dated 26.11.2019, in which it is stated that, after rectification, the total amount receivable to the respondent from the petitioner, as on the date of filing of the statement of claim is 1,06,94,293/-. The respondent has also claimed interest at the rate of 12% per annum on the principal amount of 61,51,700/- from the date of filing of the statement of claim until realisation of the decretal amount. It was recorded in the order dated 26.09.2019 that, in the event the impugned award is upheld by this Court, the respondent would execute it only to the extent stated in its affidavit.

Relevant Provisions

8. Before dealing with the contentions of the parties, it is necessary to notice the arbitration clause contained in the agreement between the parties:-

"16. ARBITRATION:

Any dispute or difference in respect of any matter relating to or arising out of the Contract will be settled in accordance with the Rules of Arbitration of Indian Council of Arbitration, Delhi and the award made in pursuance thereof shall be final and

binding on the parties. The venue of the Arbitration will be New Delhi."

9. Section 21 of the Act, which governs the invocation of proceedings, provides as follows:

"21. Commencement of arbitral proceedings.-- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. "

10. The arbitration clause makes the ICA Rules applicable to the arbitral proceedings. Rules 15 and 18 of the ICA Rules, which are relevant for adjudication of the present disputes, are reproduced below: -

"Initiation of Arbitration Rule 15

(i) Any party wishing to commence arbitration proceedings under these rules (Claimant) shall give a notice of request for arbitration to the Registrar of ICA and to the Respondent.

(ii) The notice of request (application) for arbitration to the Registrar shall be accompanied by:-

(a) the names and full addresses of the parties to the dispute

(b) statement of the claim and facts supporting the claim, points at issue and relief or remedies sought with other details of the claimants case.

(c) original or duly certified copies of the arbitration agreement, any contract or agreement out of or in connection with which the dispute has arisen and such other documents and information relevant or relied upon.

(d) Registration Fee of Rs.10,000/- for claims up to Rs.

One Crore and Rs.20,000/- for claims more than Rs. One Crore.

(e) The Arbitration shall be deemed to have commenced on the day the application for arbitration, registration fee and statement of claim are received in the office of the Council.

xxxx xxxx xxxx
Defence Statement
Rule 18

(a) On receipt of the application together with the claim statement, the Registrar shall send to the other Party (Respondent) a copy of the claim statement and

attached documents and ask such other party to furnish within thirty days or within any extended date not exceeding thirty days, a defense statement setting out his case accompanied by all documents and information in support of or bearing on the matter.

(b) Any communication sent by the Registrar under Registered Post to the Respondent on the address appearing in the Arbitration Agreement/the contract between the parties, as per the information supplied to the Council, will be deemed to be duly served on the Respondent, if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address last known, even if the Respondent refuses to accept the said communication or if it is returned to the Council by the postal authorities as unclaimed by the said party. The Registrar may proceed further with the arbitration proceedings as per the rules as if such communication had been duly served on the concerned party. The Registrar may in such cases make an additional communication to the Parties by Registered Letter or by other means which may provide a record of attempts to deliver it.

(c) A copy of the defence statement and all appended documents, if any, shall be sent to the Claimant for information.

(d) The communication is deemed to have been received on the day it is so delivered"

[Although there was initially some controversy between the parties regarding the exact text of the Rules as applicable at the relevant time, learned counsel for both parties ultimately agreed that the above extracted provisions governed the proceedings in question.] Analysis

11. The petitioner's contention is that it had not received any notice of commencement of arbitration in terms of Section 21 of the Act, and Rule 15 of the ICA Rules. This contention must be examined in the context of the correspondence between the parties. In view of the fact that much will turn on the nature of the correspondence exchanged, the communications between the parties are dealt with in some detail hereinbelow:-

(a) The first communication which is relevant in this connection is a legal notice dated 14.12.2012 addressed by counsel for the respondent to the petitioner. After setting out the facts as contended by the respondent, it was stated in the said notice as follows: -

"9. That in view of the said risk sale carried out by my clients and in view of your failure to lift the said materials, my clients had suffered losses on account of risk sale of the said material amounting to Rs.54,27,500/- . My client is also entitled to interest on the said amount @12.75% monthly rest basis w.e.f. 23.06.2010 to 4 th October 2011, when the said amount became due and payable amounting to Rs.26,56,129/-. Apart from the said amount my client is also entitled to the Warehousing charges amounting to Rs.7,24,200/- which you had agreed to pay in terms of the tender conditions & other charges Rs.1103/- towards Survey Charges. As

such, you are liable to pay a sum of Rs. 88,08,932/- along with interest to my client.

Under the facts and circumstances stated herein above, I by way of this notice to pay a sum of Rs.88,08,932/- alongwith interest @ 18% p.a. w.e.f. 05.10.2011 till the date of payment/realization; to my client within a period of 15 days from the receipt of this notice, failing which my client shall be constrained to initiate appropriate legal action against you for recovery of the said amounts and interest thereon including initiation of arbitration proceedings entirely at your risk, costs and consequences. Copy of this notice is retained in my office for taking further action in the matter."

(b) The petitioner responded to the aforesaid legal notice by its counsel's communication dated 11.01.2013, wherein the contents of the letter dated 14.12.2012 were disputed on merits, and a claim was in fact raised on behalf of the petitioner in the following terms:-

"...Therefore there has been no failure on the part of my client for which my client are at all responsible for any forfeiture of any earnest money deposited by my client in terms of the aforesaid tender but on the contrary my client are liable for sum of Rs.10,75,000/- by way of loss and damages suffered under in view of the under value sale of 250 MT import Toor Lemon Myanmar Origin to one M/s. A. K. Enterprise, Navi Mumbai @ of Rs.21,100/- per MT which was wrongfully confirmed on 5th September, 2011 for certain extraneous reasons which are best known to your client. I deny and dispute, therefore, in view of the facts as stated herein above that your client are at all entitled or has suffered any loss on account of any alleged risks sale to a sum of Rs. 54,27,500/- and/or entitled to any alleged interest @ 12.75% month rest with effect from 23rd June, 2010 to 4th October, 2011 to a sum of Rs.26,56,129/- along with any alleged warehousing charges amounting to Rs.7,24,200/- with other charges of Rs.1,103/- thereby to a alleged total amount of Rs. 88,08,932/- along with interest from my client as alleged or at all.

I say that on the contrary in view of the aforesaid facts and circumstances and the illegal and wrongful method which had been adopted by your client in dealing with my client with respect to the aforesaid purported acts, my client is entitled to a sum of Rs.10,75,000/- @ 18% interest per annum for the aforesaid sum for loss and damages suffered by my client and for further sum which my client would be entitled to for losses and damages from third parties caused by the aforesaid wrong acts and omissions of your client and accordingly your client are requested to make payment of aforesaid sum within a period of 15 days from receiving the instant notice and reply to your notice dated 14th December, 2012 which my client had received on 19th December, 2012 or my client would be compelled to initiate proceedings in accordance with law for which you will be responsible for all costs and consequences."

(c) On 16.04.2013, the respondent addressed its first communication to the ICA enclosing therewith a copy of its statement of claims, documents in support thereof, and the requisite fees.

(d) These documents were further sent by the ICA to the petitioner under cover of a letter dated 26.04.2013. Notice of arbitration was given to the petitioner by this communication, and the petitioner was asked to file its defence statement and counter-claim if any. The petitioner was also required to forward the name of a nominee arbitrator of its choosing from the ICA panel. The aforesaid communication did not elicit a response, and the ICA addressed reminders to the petitioner on 11.07.2013 and 10.09.2013.

(e) The first communication of the petitioner to the ICA was addressed thereafter on 23.09.2013. The petitioner's contention was as follows: -

" I, the undersigned would like to inform you that the captioned letter was received on 15.09.2013 and due to paucity of time and pre-occupied work steps as asked for and reply could not be forwarded to you by 24.09.2013.

In nut shell the undersigned invites your attention to the facts that tender notice number MMTC/Pulses/Sale/2010-11/04 dated 31.05.2010 was never acted upon either by the claimant or the respondent as such a dead dispute cannot be the matter arbitration and conciliation.

Further more undersigned would like to inform you that some more time may be allowed to think over the dead dispute and also to take further steps in this regard. It is also pertinent to mention here that paucity of time does not permit the undersigned to take all suitable steps in this regard.

Under the facts and circumstances you are requested to allow responsible time to take all suitable steps in time in this regard."

(f) The next letter addressed by the petitioner to the ICA, is dated 28.10.2013. The specific contention under Section 21 was taken in this letter in the following terms:-

" I, the undersigned would like to inform you that at the first instance it is also embarrassing for us that how you have been approached for holding this reference as the claimant did not make any communication regarding existence of any dispute. This is further to inform you that there was no communication as to initiation of arbitration in case the disputes are not resolved. Under the facts and circumstances you are requested to direct the claimant to supply us documents regarding compliance of Section 21 of the Arbitration and Conciliation Act, 1996 so that we can take appropriate steps for challenging the initiation of reference before you also adjourn this reference till the supply of documents as aforesaid."

(g) The petitioner has placed on record two further communications to the ICA. Its letter dated 03.12.2013 does not appear to be relevant to the dispute at hand. However, in its further communication dated 23.12.2013 (in response to a letter dated 16.12.2013, which is not on record), the petitioner contended as follows: -

" We are very much interested about your statements made in paragraph number 3 of your letter under reference and particularly point C of the said paragraph. Firstly we are not interested in any sort of arbitration as such we are also not interested in appointment of arbitrator of our choice.

We further say that neither Section 21 of the Arbitration and Conciliation Act, 1996 has been complied with nor the arbitrator has been appointed as such our participation in arbitration proceeding is not required.

We further say that paragraph numbers 4 and 5 of your letter under reference do not require any comment as there is admission that arbitral Tribunal has not been constituted.

We further say that the gravity of each and every letter sent by your institution has been considered and replied accordingly. We once again request you to direct the claimant to comply with Section 21 of the Arbitration and Conciliation Act, 1996 and to supply the proof of the same to us. "

(h) The other letters placed on record draw the attention of the ICA to the proceedings in the petitioner's title suit in the City Civil Court. The allegation regarding non-compliance of Section 21 of the Act is reiterated.

12. At the outset, the contention of Mr.Kumar, relying upon two judgments of this Court, that a dispute as to compliance with Section 21 of the Act can be decided by the arbitrator under Section 16 and not by the Court under Section 34, must be dealt with. In Oval Investment Pvt. Ltd. & Ors. vs. Indiabulls Financial Services Ltd. & Ors. 2009 (112) DRJ 195, the learned Single Judge accepted this view, following the judgment of the Division Bench of the Bombay High Court in Singhal & Brothers vs. Mahanagar Telephone Nigam Ltd., 2005(5) Bom CR 261. Similarly, the Division Bench judgment in S.N. Malhotra & Sons. vs. Airport Authority of India & Ors. 2008 (103) DRJ 196 (DB) took the same view with regard to the jurisdiction of the Arbitral Tribunal under the contract between the parties. In the present case, however, although the petitioner did not formally participate in the arbitral proceedings, its communications to the ICA did highlight the objection under Section 21. I am therefore of the view that the petitioner's challenge on this ground must be examined on its merits in this petition, and the respondent's preliminary objection is rejected.

13. On the merits of the petitioner's submissions, having regard to the aforesaid correspondence, I am of the view that the petitioner's contention on the basis of Section 21 of the Act is wholly unmerited. The provision requires a party to send a request to the counter-party for the dispute to be referred to arbitration. The respondent's communication dated 14.12.2012 meets that requirement. The facts leading to the dispute, and the nature of the respondent's claim were made sufficiently clear in that letter. The respondent also stated that legal recourse would be taken by the respondent if its claim was not satisfied. The initiation of arbitration proceedings in such a situation was expressly contemplated. The petitioner's response of 11.01.2013 extracted above deals with the respondent's claim on merits and, in fact, raises a claim on behalf of the petitioner itself, along with a

threat of legal action. My conclusion in this regard is supported by a judgment of the Rajasthan High Court, cited by Mr. Sanat Kumar. In *RIICO Ltd. Jaipur & Ors. vs. Manoj Ajmera & Anr.*, (2008) 2 ArbLR 388, the Rajasthan High Court held that a communication claiming a disputed amount and contemplating arbitration in the alternative is sufficient notice of a request for arbitration.

14. The petitioner's reliance on Rule 15 of the ICA Rules also does not take its case much further. Rule 15(i) requires a notice of request for arbitration to be sent to the ICA and to the other party. The respondent herein had already given the notice of request for arbitration to the petitioner as aforesaid. Its communication dated 16.04.2013 to the Registrar of the ICA included all the documents contemplated by Rule 15(ii). The Rules, on a plain reading, require compliance of Rule 15(ii) in the communication addressed to the Registrar. Rule 15(i) requires that the proposed respondent in the arbitration also be given notice of the request for arbitration, but does not necessitate that the same communication be addressed both to the Registrar and the respondent. It is, in fact, specifically contemplated by Rule 18 that the statement of claim and attached documents would be sent subsequently by the Registrar to the respondent. This would be entirely unnecessary if Rule 15 is to be read in the manner urged by the petitioner.

15. The parties having agreed to arbitration under ICA Rules and fulfilment of those rules (including Rule 18) having thus been demonstrated, the petitioner's grievance is wholly untenable. Section 21 in fact commences with the words, "unless otherwise agreed by the parties". This indicates that the parties' agreement regarding commencement of the arbitration would prevail. The ICA Rules in Rule 15 (ii)(e) provide for the commencement of arbitration on the day the application for arbitration, registration fee and statement of claim are received in its office.

16. Thus, viewed both from the prism of Section 21 and the ICA Rules, I do not find any irregularity in the invocation of arbitration.

17. In *Alupro* (supra), the question regarding compliance with Section 21 was raised in a case where the statement of claim was filed before an arbitrator without any formal invocation of arbitration. In these circumstances, the Court explained the purpose of Section 21 as follows:

"25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be disqualified to act as an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

29. Of course, as noticed earlier, parties may agree to waive the requirement of such notice under Section 21. However, in the absence of such express waiver, the provision must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of commencement of arbitration proceedings for the purpose of Section 43(1) of the Act, how is such date of commencement to be fixed if the notice under Section 21 is not issued? The provision talks of the Respondent receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By overlooking this important step, and straightaway filing claims before an arbitrator appointed by it, a party would be violating the requirement of Section 21, thus frustrating an important element of the parties consenting to the appointment of an arbitrator."

18. This judgment in *Alupro* (supra) is distinguishable on facts. First, there was no notice to the respondent at all in that case. In the present case, the legal notice dated 14.12.2012 fulfils the

requirement of Section 21. The purpose of Section 21, as set out in paragraph 25 of Alupro, was clearly fulfilled by the said notice and the subsequent correspondence between the petitioner and the ICA. Second, the parties in the present case had agreed on the applicability of the ICA Rules. The petitioner expressly declined to appoint an arbitrator in terms thereof. In Alupro also, the Court notices that parties can agree to waive the requirements of Section 21. This judgment itself makes it clear that the provisions are derogable, and it is possible in a given case that agreement on the rules to be followed would constitute waiver of the statutory requirement. As I have held that the statutory requirements were in fact fulfilled in the present case, it is not necessary to consider this in greater detail in the present case.

19. The correspondence extracted above also indicates that the position taken by the petitioner was entirely baseless. After receiving three communications from the ICA, the petitioner claims (in its letter dated 23.09.2013) that the tender notice dated 31.05.2010 was never acted upon and contended that "such a dead dispute" cannot be the matter of arbitration. The petitioner did not disclose that, on the very same day, it had filed the suit in the City Civil Court in which its case was completely different, namely, that the material supplied by the respondent suffered from defects of quality. On 28.10.2013, the petitioner raised the contention based on Section 21 of the Act, and on 23.03.2013, it evinced its refusal to appoint an arbitrator or participate in the proceedings. It cannot be said in these circumstances that the proceedings suffered from any irregularity in invocation.

20. The impugned award has dealt with the contention of the petitioner in this regard in the following manner:

"Statement of claim was filled by the Claimant and pursuant to notice sent to the respondent a letter was received from the respondent stating inter alia that despite request made by it to the ICA to supply papers and documents the same were not supplied. It was also stated that the respondent has filed a title suit against the Claimant challenging the validity of the Arbitration Agreement. It is stated in the letter that in the title suit, the Claimant MMTC, has filed an application under Section 8 and 21 of the Arbitration and Conciliation Act (in short referred to as "the Act") and the Arbitral Tribunal should, therefore, defer the matter till the application was filed by the Claimant herein in the Kolkata Court under Section 8 and 21 of the Act was decided by that court. The Tribunal on 4th March, 2014 directed that as there was no stay of Arbitration proceedings by any count, the Tribunal will proceed with the matter irrespective of the pendency of the said suit filed by the respondent. The Tribunal on that day could have proceeded with the matter in the absence of the respondent, however, in the interest of justice, fresh notice was directed to be issued to the Respondent for appearance on 22nd April, 2014. Despite notice, no one appeared on behalf of the respondent before the Tribunal on 22nd April, 2014 and the Tribunal, therefore, decided to proceed with the matter on the basis of the material on record. The claimant on 22nd August, 2014 filed affidavit of Mr. Dhananjay Maroti Varshnik, Deputy General Manager, MMTC certain documents were also filed with the affidavit. Additional affidavit of evidence was filed on 1st October, 2014.

On 1st October, 2014, a letter dated 24th September, 2014 received from the respondent was placed before Tribunal. It was stated in the letter that the respondent had not submitted the tender dated 7th June, 2010 which was the subject matter of dispute in the present case, and there was thus no question of the respondent intending to purchase the product in question. It was also stated in the letter that the respondent had made an application before the City Civil Court, Kolkata for production of original tender but the copy which was filed in the Court did not bear the seal and the signature of the respondent Company. It was stated that the Tribunal should adjourn the proceedings till disposal of the application of the respondent fixed for hearing on 27th November, 2014. The Tribunal on receipt of this letter observed that as there was no stay of proceedings by the Court, the proceedings cannot be adjourned.

Mr. Sanat Kumar, Ld. Counsel for the Claimant submitted that the respondent had itself admitted the submission of tender dated 7th June, 2010 in the suit filed before the Kolkata Court and placed the entire record of the said suit before the Tribunal. Arguments were heard and the award was reserved on 1st October, 2014.

xxxx xxxx xxxx I have also considered the contention of the respondent that it had not submitted the tender for purchase of the material in question and there is thus no question of arbitration between the parties for adjudication of disputes. Stand of the respondent is in my view is totally baseless in as much as tender which has been placed before me bears the signature as well as stamp of the respondent. Moreover, the respondent in its suit before the City Civil Court at Kolkata has itself admitted that it had submitted the tender through its representative Mr. Sunil Kumar and the same was accepted by the Claimant herein. That being the position in my view the respondent cannot now turn around to state that no tender was submitted by it as the said stand is clearly against the stand taken by it in the Court at Kolkata. The tender submitted on the Respondent and accepted by the Claimant contained a clause that in case of disputes between the parties, matter will be referred to Indian Council of Arbitration for arbitration. The matter in my view was, therefore, rightly referred to ICA for adjudication as per its rules of Arbitration. The stand now taken by the respondent in my view is wholly false and baseless."

21. The view taken by the learned arbitrator in this regard is entirely in accordance with the facts of the case. The petitioner had accepted, in its suit in Calcutta, that the tender was submitted by it and contended directly to the contrary before the Tribunal. Its conduct is marked by supreme indifference to the sanctity of the dispute resolution process to which it had subjected itself.

22. Turning now to the factual grounds taken in the petition, I find that these are beyond the scope of Section 34 of the Act. The arbitrator has decided the matter on the evidence led before him, as follows:

"In support of its case, the Claimant has placed on record the copy of the tender dated 7th June, 2010 submitted by the respondent (marked as Ex. CW 1/2) which also contains the terms and conditions. The tender document also contained the terms and conditions which on its acceptance would have been binding on the parties. The tender was accepted vide the letter of acceptance of the Claimant dated June 11th, 2010 (marked as exhibit CW1/3). By the letter of acceptance the respondent was informed that the Claimant had additional quantity of 500 MT of "Toor whole Lemon" which they would also like to offer to the respondent and they wanted to know the respondent's interest in the above offer. The respondent was also asked to make the balance payment in respect of 250 MT for which the tender was accepted and arrange to lift the material within the free time allowed as per the terms and conditions of the subject tender. The respondent, however, did not lift the material within the free time. By letter dated 21st June, 2010 (exhibit CW 1/5) the respondent was asked to make full payment and lift the material by 22nd June, 2010 which was the free time for lifting of the material. The respondent, however, did not respond to the letters of the claimant and reminders dated 06.07.2010 and 15.07.2010 (marked as CW 1/6 and CW 1/7) were sent to the respondent. Final opportunity was given by letter dated 17th September, 2010 (marked as CW1/8) to lift the material upto 30 th September, 2010 after making full payment of Rs.1,07,50,000/- for the entire quantity of 250 MT of "Toor whole Lemon". In the meantime, vide their letter dated 29th September, 2010 (marked as CW 1/9), the respondent came up with a false plea of the material being not as per specifications mentioned in the tender. The allegation according to the Claimant was clearly an afterthought. When the respondent failed to remit the payment and lift the material despite several reminders and notices, the claimant forfeited the earnest money of Rs.5,75,000/-.

xxxx xxxx From the record and the evidence filed by the Claimant. I am satisfied that the respondent had failed to lift the material despite notices and the Claimant made all efforts to sell the material at the risk of the Respondent. ..."

[Emphasis supplied] It has been held in several judgments of the Supreme Court, including Associate Builders vs. Delhi Development Authority, AIR 2015 SC 620, that re-appreciation of evidence is not open to the Court under Section 34. It is evident from the above extract of the award itself that this is not a case where the award was entirely unsupported by evidence, or where the arbitrator failed to consider any material evidence. The petitioner chose not to participate in the arbitration proceedings or to bring its own evidence and arguments before the arbitrator. The learned arbitrator therefore rightly proceeded on the evidence led by the respondent.

Conclusion

23. For the reasons aforesaid, the petitioner has failed to make out any grounds for interference with the impugned award under Section 34 of the Act. The petition is dismissed with costs assessed at 50,000/-.

24. However, the respondent is bound to its affidavit dated 26.11.2019 and its statement that the award would be executed only to the extent mentioned in the affidavit. It is made clear that this Court has not adjudicated upon the correctness of the amounts stated by the respondent, and this order is without prejudice to the petitioner's right, if any, in this regard.

PRATEEK JALAN, J.

JANUARY 06, 2020/s